DePaul Law Review

Volume 58
Issue 1 *Fall 2008*

Article 6

Bootleggers Beware: United States v. Martignon Upholds Congressional Power to Enact Copyright-Like Legislation through the Commerce Clause

Valerie R. Sherman

BOOTLEGGERS BEWARE: *UNITED STATES V. MARTIGNON* UPHOLDS CONGRESSIONAL POWER TO ENACT "COPYRIGHT-LIKE" LEGISLATION THROUGH THE COMMERCE CLAUSE

INTRODUCTION

Digital bootlegging is gaining national and international recognition as one of the most serious problems facing the global music industry.[1] While bootleggers have been illicitly copying various art forms for hundreds of years,[2] digital technology has facilitated a widespread system for creating and copying digital files.[3] In the music recording industry, the unauthorized recording and distribution of musical performances is a large subset of digital bootlegging and piracy.[4] Bootlegs are essentially recordings of live music that the performer never "intended to be commercially produced and made available to the public."[5] In short, "bootlegging . . . is theft."[6]

---

1. The International Federation of the Phonographic Industry (IFPI) estimates that in 2005 the amount of "pirated" CDs in the global marketplace was $4.5 billion, and twenty billion songs were shared online. IFPI, THE RECORDING INDUSTRY 2006 PIRACY REPORT 4 (2006), http://www.ifpi.org/content/library/piracy-report2006.pdf [hereinafter IFPI REPORT]. One study from Los Angeles indicates that piracy of sound recordings cost the L.A. recording industry $851 million in 2005. GREGORY FREEMAN, NANCY D. SIDHU & MICHAEL MONTOYA, A FALSE BARGAIN: THE LOS ANGELES COUNTY ECONOMIC CONSEQUENCES OF COUNTERFEIT PRODUCTS i (2007), http://www.laedc.org/consulting/projects/2007_piracy-study.pdf [hereinafter L.A. REPORT]. *But see* CLINTON HEYLIN, BOOTLEG! THE RISE AND FALL OF THE SECRET RECORDING INDUSTRY 1, 3 (2004) (arguing that "bootlegs have been a positive influence on the music" and that "bootleggers are the ultimate free-marketers, giving fans what they want—and to hell with the wishes of the artist or recording company").

2. For a history of bootlegging from Shakespeare to the present day, see HEYLIN, *supra* note 1, at 13–21. For a brief history of the unauthorized (and, in some cases, authorized) bootlegging in the past century, see Craig W. Mandell, *Balance of Powers: Recognizing the Uruguay Round Agreement Act's Anti-Bootlegging Provisions as a Constitutional Exercise of Congress's Commerce Clause Authority*, 54 J. COPYRIGHT SOC'Y USA 673, 674–75 (2007).

3. *See* IFPI REPORT, *supra* note 1; L.A. REPORT, *supra* note 1.

4. In 1994, the year that Congress enacted the criminal anti-bootlegging statute, the music industry lost $400 million to the unauthorized recording and copying of live performances. Todd Patterson, *The Uruguay Round's Anti-Bootlegging Provision: A Victory for Musical Artists and Record Companies*, 15 WIS. INT'L L.J. 371, 413 (citing David Yonke, *Legalities Aside, Bootlegs Booming*, ROCKY MTN. NEWS, Sept. 20, 1994, at 8D).

5. *Id.* at 373.

6. Brief for the United States of America at 6, United States v. Martignon, 492 F.3d 140 (2d Cir. 2007) (No. 04-5649-cr).

While copyright law in the United States grants a specific bundle of rights to authors,[7] U.S. law remains less protective of authors' rights than many countries, especially with its limited acceptance of certain international agreements.[8] In an attempt to unify the worldwide landscape for protection of authors' intellectual property rights, the international community came together to create several agreements, including the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), signed at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT).[9] Specifically, to comply with TRIPS, the United States enacted the Uruguay Round Agreements Act (URAA),[10] part criminal intellectual property legislation to further protect authors' rights in America.[11] There have been numerous constitutional challenges to the legislation that Congress enacted pursuant to its international obligation, including those statutes targeting bootlegging of audio and visual performances.[12]

The most recent constitutional challenge to Congress's criminal anti-bootlegging statute, 18 U.S.C. § 2319A, surfaced in *United States v. Martignon*.[13] Defendant Jean Martignon was arrested and indicted for selling bootlegged musical performances through a music store and mail-order service.[14] The district court, however, found that neither the Copyright Clause,[15] nor the Commerce Clause,[16] authorized Congress to enact the criminal statute.[17] On appeal, the Second Circuit vacated and remanded, holding that even though Congress could not enact § 2319A through the Copyright Clause, it could enact the statute through the Commerce Clause.[18]

In *United States v. Martignon*, the Second Circuit resolved a potential conflict between the Copyright Clause and the Commerce Clause.

---

7. *See infra* note 133.

8. *See generally* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 17.01 (2008).

9. *See infra* notes 26–29 and accompanying text.

10. Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994); *see infra* notes 26–29 and accompanying text.

11. *See infra* note 29 and accompanying text.

12. *See infra* notes 53–141 and accompanying text.

13. United States v. Martignon, 492 F.3d 140 (2d Cir. 2007); 18 U.S.C. § 2319A (2000).

14. Brief for the United States, *supra* note 6, at 3.

15. U.S. CONST. art. I, § 8, cl. 8 ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

16. *Id.* cl. 3 ("The Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several states and with the Indian Tribes").

17. United States v. Martignon, 346 F. Supp. 2d 413, 424–25 (S.D.N.Y. 2004), *vacated*, 492 F.3d 140 (2d Cir. 2007).

18. *Martignon*, 492 F.3d at 153.

The decision is justified by the grave nature of the bootlegging problem, as well as United States' international obligations. Part II sets the backdrop against which *Martignon* was decided, specifically examining the URAA, anti-bootlegging statutes, and other constitutional challenges to anti-bootlegging statutes.[19] Part III summarizes *Martignon* and discusses its conclusion that § 2319A is not a copyright law, but may be enacted through the Commerce Clause.[20] Part IV analyzes the *Martignon* opinion, examines relevant scholarly writings, and concludes that the Second Circuit's reasoning is sound.[21] Finally, Part V forecasts *Martignon*'s impact on the landscape of copyright law and the Commerce Clause power.[22]

II. BACKGROUND

This Part discusses *Martignon*'s background. First, it draws on the importance of the international obligations the United States undertook in codifying the URAA.[23] It then explains the substance and development of § 2319A, the criminal anti-bootlegging statute that is the subject of *United States v. Martignon*.[24] Finally, this Part examines constitutional challenges to anti-bootlegging statutes in other circuits and sets the stage for *Martignon* by examining the interplay between the Copyright Clause and the Commerce Clause.[25]

A. The Uruguay Round Agreements Act

The United States and other nations created consistent international standards for various intellectual property rights through the TRIPS agreement.[26] TRIPS imposed certain obligations on member states, including standards for copyright, trademark, and patent protection.[27] To comply with the TRIPS agreement, the U.S. Congress implemented the URAA, which enacted into law the provisions agreed upon at the Uruguay Round negotiations of the GATT.[28] The URAA, enforceable through the World Trade Organization (WTO),

19. *See infra* notes 23–72 and accompanying text.

20. *See infra* notes 73–141 and accompanying text.

21. *See infra* notes 142–261 and accompanying text.

22. *See infra* notes 262–275 and accompanying text.

23. *See infra* notes 26–29 and accompanying text.

24. *See infra* notes 30–52 and accompanying text.

25. *See infra* notes 53–72 and accompanying text.

26. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 108 Stat. 4809, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

27. *See id.*

28. 4 NIMMER & NIMMER, *supra* note 8, § 4.05[B][6] (noting that Congress enacted the URAA as part of its obligations under TRIPS); *see* Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

was designed to increase U.S. compliance with certain norms of international copyright law, including criminal intellectual property statutes.[29]

B. 18 U.S.C. § 2319A—Criminal Copyright Infringement

On December 8, 1994, Congress enacted section 513 of the URAA, codified at 18 U.S.C. § 2319A. Section 2319A imposes criminal penalties on a person who infringes an author's copyright by recording and distributing the author's live musical performances.[30] This section describes Congress's enactment of § 2319A, as well as the substance of the law.[31]

1. Enacting 18 U.S.C. § 2319A

Congress was reluctant to impose criminal copyright sanctions as recently as the 1980s, but as a result of advances in technology, Congress established penal sanctions for some types of copyright infringement.[32] By signing the TRIPS agreement and other international agreements, the United States assumed obligations to enact legislation to maintain compliance with those agreements.[33] Congress's obligation, then, was not to "formulate policy" or make findings as to intellectual property crimes in the United States, but only to implement legislation in accordance with the executive branch's international commitments.[34]

To this end, the legislation for the URAA was put on a "fast-track" basis in Congress, which was unusual[35] and somewhat problematic.[36]

---

29. Symposium, United States v. Martignon—*Case in Controversy*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1223, 1225–26 (2006) [hereinafter *Martignon* Symposium] (citing TRIPS Agreement, *supra* note 26). International law imposes affirmative obligations upon the United States, which materialized during the TRIPS agreement process:

> This particular round of WTO agreements was noteworthy because it incorporated for the first time protections for intellectual property and services, so that if one were found to violate the obligations that the treaty imposed, then a recalcitrant country could be taken to a WTO panel and have cross-sector retaliation imposed.

Id.

30. 18 U.S.C. § 2319A (2000).

31. *See infra* notes 32–52 and accompanying text.

32. Geraldine Szott Moohr, *The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory*, 83 B.U. L. REV. 731, 736–37 (2003).

33. *Martignon* Symposium, *supra* note 29, at 1226.

34. *Id.*

35. David Nimmer, *The End of Copyright*, 48 VAND. L. REV. 1385, 1407 (1995) ("Procedurally, [the URAA's] most salient feature is that it was implemented on a fast-track basis."). The URAA was also enacted by a "largely lame duck" Congress without a single revision. *Id.* at 1408.

36. *See Martignon* Symposium, *supra* note 29, at 1227.

The controversial fast-track process[37] did not allow Congress to change or amend the legislation once it was introduced.[38] In exchange for the ability to enact legislation quickly, Congress gave up the power to balance the interests and incentives of relevant parties.[39] Because the URAA, like many other multinational international agreements,[40] was introduced as fast-track legislation, Congress was effectively unable to give input in the formulation of the bill.[41] Further, the criminal anti-bootlegging section of the URAA was a small part of the 3000-page bill that was introduced, and it was unlikely that Congress members would vote against the URAA even if they disagreed with a small segment of the overall bill.[42] Thus, in 1994, Congress passed URAA section 513, Criminal Penalties for Unauthorized Fixation of and Trafficking in Sound Recordings and Music Videos or Live Musical Performances,[43] which implemented criminal sanctions for bootlegging musical performances in Title 18 of the United States Code.[44]

2. *Consequences of Violating 18 U.S.C. § 2319A*

A person violates § 2319A if she

> without the consent of the performer or performers involved, knowingly and for purposes of commercial advantage or private financial gain—
>
> (1) fixes the sounds or sounds and images of a live musical performance in a copy or phonorecord, or reproduces copies or phonorecords of such a performance from an unauthorized fixation;

---

37. The term "fast-track" is also known as trade promotion authority. TRADE PROMOTION AUTHORITY ANNOTATED, S. PRT. NO. 110-10, at 1 (2007), *available at* http://finance.senate.gov/TradePromotionAuthority.pdf.

38. Trade Act of 1974, 19 U.S.C. § 2191(d) (1975).

39. *Martignon* Symposium, *supra* note 29, at 1227 (discussing the phenomenon that treaty obligations supersede Congress's ability to balance issues relating to the American public).

40. Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 94 AM. J. INT'L L. 102, 136 (2000) (noting that after the enactment of the Trade Act of 1974, most of the United States' multilateral international agreements were passed on a fast-track basis).

41. *Martignon* Symposium, *supra* note 29, at 1227 (William Patry, the drafter of § 2319A, discussed the difficulties of drafting a bill that Congress may not revise by stating: "you had to get it right before the bill went in—not like ordinary bills, where you can hold hearings, you can change it, you can listen to people, you can play with it . . . . That wasn't the case here. You either got it right or you didn't.").

42. *Id.* ("There was no way anybody was going to vote against the bill based upon on [sic] some intellectual property provision. As important as we may think intellectual property is, I can tell you, in a 3,000-page trade bill, it doesn't mean diddly-squat.").

43. Uruguay Round Agreements Act, Pub. L. No. 103-465, § 513, 108 Stat. 4809 (1994) (codified at 18 U.S.C. § 2319A (2000)).

44. *Id.* At the same time, Congress enacted a civil bootlegging statute in Title 17, which is similar to § 2319A. *See* 17 U.S.C. § 1101 (2000).

(2) transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance; or
(3) distributes or offers to distribute, sells or offers to sell, rents or offers to rent, or traffics in any copy or phonorecord fixed as described in paragraph (1), regardless of whether the fixations occurred in the United States . . . .[45]

A convicted defendant faces several types of consequences for violation of § 2319A, including imprisonment and fines,[46] as well as forfeiture, seizure, and destruction of the infringing copies.[47] A conviction under § 2319A will result in imprisonment of up to five years in prison or a fine, as set out in Title 18.[48] For subsequent violations of § 2319A, a defendant may receive a heightened prison sentence of up to ten years or a greater fine.[49]

Courts may also order the forfeiture and destruction of any infringing copies or phonorecords.[50] If the offense is severe, the court may also order the destruction of any equipment that the defendant used to create the copies or phonorecords.[51] Further, if the defendant in a § 2319A action created the unauthorized recordings outside the United States, courts may order the seizure of those copies "in the same manner as property imported in violation of the customs laws."[52]

C. Constitutional Challenges to Anti-Bootlegging Statutes

Since Congress enacted the civil and criminal anti-bootlegging statutes in the 1990s, parties have brought several constitutional challenges in federal court.[53] Though federal district courts have reached different conclusions regarding the constitutionality of anti-bootlegging statutes, circuit courts have upheld the statutes as constitutional.[54]

---

45. 18 U.S.C. § 2319A(a).

46. *Id.*

47. § 2319A(b)–(c).

48. § 2319A(a).

49. *Id.*

50. § 2319A(b).

51. *Id.*

52. § 2319A(c).

53. *See generally* Dotan Oliar, *Resolving Conflicts Among Congress's Powers Regarding Statutes' Constitutionality: The Case of Anti-Bootlegging Statutes*, 30 COLUM. J.L. & ARTS 467 (2007).

54. *See* United States v. Martignon, 492 F.3d 140, 153 (2d Cir. 2007); United States v. Moghadam, 175 F.3d 1269, 1269 (11th Cir. 1999); KISS Catalog, Ltd. v. Passport Int'l Prods., Inc. (*KISS II*), 405 F. Supp. 2d 1169, 1177 (C.D. Cal. 2005).

1. United States v. Moghadam

In 1999, the Eleventh Circuit Court of Appeals heard a constitutional challenge to § 2319A in *United States v. Moghadam*.[55] The defendant was convicted of violating § 2319A after he pled guilty to knowingly distributing, selling, and trafficking unauthorized CDs featuring live musical performances of recording artists, such as Tori Amos and the Beastie Boys.[56] On appeal, the Eleventh Circuit assumed that § 2319A could not satisfy the fixation requirement of the Copyright Clause, but the court ruled that the statute had a sufficient connection to interstate and foreign commerce to fall within Congress's authority under the Commerce Clause.[57]

The Eleventh Circuit referred to the rights conferred by § 2319A as "hybrid rights," which are similar to but separate from the typical sticks in the copyright bundle of rights.[58] Specifically, the court assessed the fixation requirement of U.S. copyright law, though it did not rule on Congress's power to enact § 2319A through the Copyright Clause.[59] Instead, the court ruled that § 2319A may be enacted through the Commerce Clause because it was rationally related to interstate commerce.[60] The court referred to several Supreme Court cases to support the idea that Congress may enact legislation through the Commerce Clause.[61] According to the analysis of those cases, the *Moghadam* court determined that Congress may enact "hybrid" legislation through the Commerce Clause, even when it may not enact the same legislation through otherwise relevant constitutional avenues, such as the Copyright Clause.[62]

---

55. *Moghadam*, 175 F.3d at 1269.

56. *Id.* at 1271.

57. *Id.* at 1282. The Eleventh Circuit reasoned that although the term "Writings" in the Copyright Clause "allows Congress to extend copyright protection to a great many things, those things have always involved some fixed, tangible durable form." *Id.* at 1274. Moghadam argued that a live performance "has not been reduced to a tangible form or fixed as of the time of the performance," and the Eleventh Circuit assumed, without deciding, that the fixation concept of the Copyright Clause does not extend to live performances that have not been reduced to a fixed form. *Id.*

58. *Id.* at 1272–73.

59. *Id.* at 1274.

60. *Id.* at 1275–76 ("Section 2319A clearly prohibits conduct that has a substantial effect on both commerce between the several states and commerce with foreign nations. . . . Moreover, the type of conduct that Congress intended to regulate by passing the anti-bootlegging statute is by its very nature economic activity.").

61. *Moghadam*, 175 F.3d at 1277, 1279 (citing South Dakota v. Dole, 483 U.S. 203 (1987); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); The Trade-Mark Cases, 100 U.S. 82 (1879); Authors League of Am., Inc. v. Oman, 790 F.2d 220 (2d Cir. 1986)). The Second Circuit in *Martignon* later referred to several of the cases cited in the *Moghadam* opinion. *See infra* notes 104–124 and accompanying text.

62. *Moghadam*, 175 F.3d at 1282.

2. *The* KISS *Cases*

Additionally, in *Kiss Catalog, Ltd. v. Passport International Products, Inc.*,[63] a district court in the Central District of California ultimately upheld the constitutionality of 17 U.S.C. § 1101, the civil anti-bootlegging statute.[64] Initially, however, the district court ruled that § 1101 was unconstitutional because the limits contained in the Copyright Clause prohibit Congress from enacting legislation such as § 1101 through the Commerce Clause.[65] The district court reasoned that the framers intended to limit Congress's power to enact copyright laws, and that to allow "the current scope of the Commerce Clause to overwhelm those limitations altogether would be akin to a 'repeal' of a provision of the Constitution."[66] The court relied on the Supreme Court's decision in *Railway Labor Executives' Ass'n v. Gibbons*,[67] the "most instructive case on this issue."[68] Citing *Gibbons*, the district court wrote that the Supreme Court limits Congress's Article I, Section 8 powers from subversion by the Commerce Clause.[69]

However, the district court later vacated its opinion and sided with the Eleventh Circuit's decision in *Moghadam*.[70] The court reversed its earlier treatment of the *Gibbons* decision:

> [T]he question is not whether legislation empowered by the Copyright Clause—but invalid under it—can otherwise be empowered by the Commerce Clause. The question is whether matters not encompassed within the Copyright Clause can be addressed by the Com-

---

63. *KISS II*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005). For a more detailed discussion of the *KISS* cases, see Angela T. Howe, United States v. Martignon & KISS Catalog v. Passport International Products: *The Anti-bootlegging Statute and the Collision of International Intellectual Property Law and the United States Constitution*, 20 BERKELEY TECH. L.J. 829 (2005).

64. *See* 17 U.S.C. § 1101 (2000). The civil anti-bootlegging statute is substantially similar to its criminal counterpart, except that the criminal statute requires that the defendant create the bootlegs knowingly and for commercial gain. *See* 18 U.S.C. § 2319A (2000).

65. KISS Catalog, Ltd. v. Passport Int'l Prods., Inc. (*KISS I*), 350 F. Supp. 2d 823, 836 (C.D. Cal. 2004) (distinguishing the *Trade-Mark Cases*, *Heart of Atlanta*, and other cases).

66. *Id.* at 836–37.

67. Ry. Labor Executives' Ass'n v. Gibbons, 455 U.S. 457 (1982).

68. *KISS I*, 350 F. Supp. 2d at 836. *KISS I* elaborated on the extent of the limits of the Copyright Clause:

> The *Railway Labor* Court examined a clause, like the Copyright Clause, that both provides a positive grant of power and contains an express limit. In the instant case, allowing Congress to invoke the Commerce Clause in a situation where the Copyright Clause would otherwise be violated would "eradicate from the Constitution a limitation on the power of Congress."

Id. at 836–37 (citing *Gibbons*, 455 U.S. at 469).

69. *KISS I*, 350 F. Supp. 2d at 836.

70. *KISS II*, 405 F. Supp. 2d 1169, 1177 (C.D. Cal. 2005).

> merce Clause free of the restrictions of the Copyright Clause. The answer to that question is, clearly, yes.[71]

Thus, the district court ruled that the civil anti-bootlegging statute did not offend the Constitution's grant of power to Congress to legislate under the Commerce Clause.[72]

III. SUBJECT OPINION: *UNITED STATES V. MARTIGNON*

The Second Circuit carefully analyzed the lower court's opinion in *Martignon* by consulting various sources to classify § 2319A as either copyright or commercial legislation. In examining the lower court's holding and Martignon's appeal, the Second Circuit first focused on whether the Copyright Clause limitations prevented Congress from enacting § 2319A under the Commerce Clause.[73] Then, to determine the scope and limits of the Copyright Clause, the Second Circuit considered Supreme Court jurisprudence, as well as several approaches detailing whether § 2319A could be classified as a copyright law.[74] Finally, the Second Circuit elaborated on whether § 2319A might fall under the Commerce Clause.[75]

A. The District Court Holding and the Second Circuit's Interpretation

In 2004, criminal defendant Jean Martignon challenged the constitutionality of § 2319A in *United States v. Martignon*.[76] Until 2003, Martignon operated a record business comprised of "a Manhattan store, a catalog service, and an Internet site."[77] The Recording Industry Association of America (RIAA), in conjunction with law enforcement agencies, investigated Martignon's business.[78] In 2003, Martignon was arrested and indicted in the Southern District Court of New York under § 2319A for selling unauthorized sound recordings of live concerts.[79]

---

71. *Id.* at 1176.

72. *Id.* at 1177.

73. *See infra* notes 76–99 and accompanying text.

74. *See infra* notes 100–134 and accompanying text.

75. *See infra* notes 135–141 and accompanying text.

76. United States v. Martignon, 346 F. Supp. 2d 413 (S.D.N.Y. 2004), *vacated*, 492 F.3d 140 (2d Cir. 2007).

77. *Id.* at 417.

78. *Id.*

79. *Id.* The court noted that the one-count indictment "provides no further details as to, e.g., the artists that Martignon allegedly bootlegged, the scope of the bootlegging, or the distribution of bootlegged works." *Id.*

Martignon moved to dismiss the federal indictment, challenging the constitutionality of § 2319A as enacted through the Copyright Clause and arguing that § 2319A conflicted with the First Amendment.[80] The United States admitted that § 2319A "was likely beyond Congressional authority under the Copyright Clause" and urged the district court to find that the statute was constitutional under the Commerce Clause,[81] as the Eleventh Circuit had in *Moghadam*.[82] Instead, the district court dismissed the case based on § 2319A's conflict with copyright law.[83] The district court first examined the legislative history of § 2319A.[84] The court found that the extant history supported the classification of § 2319A as a copyright law because the TRIPS agreement was meant to protect intellectual property rights, and also because the statute was similar in definition and placement to other copyright legislation.[85] However, despite its "copyright-like" nature, the district court held that § 2319A was not validly enacted under the Copyright Clause, because it gives rights to a performer that are unlimited in time without requiring the performer to reduce his performance to a fixed form.[86]

Further, the district court held that Congress could not enact such "copyright-like" legislation through the Commerce Clause because the conflict would violate the limitations imposed by the Copyright Clause.[87] To support this reasoning, the district court relied on *Railway Executives' Labor Ass'n v. Gibbons*,[88] in which the Supreme Court struck down a bankruptcy law due to a constitutional conflict with the Bankruptcy Clause and the Commerce Clause.[89] Therefore, the district court invoked the constitutional doctrine that "Congress may not do indirectly what it is forbidden to do directly."[90] Based on this reasoning, the district court dismissed the United States' claim against Martignon.[91]

---

80. *Id.* at 416–17.

81. Brief for the United States, *supra* note 6, at 4.

82. United States v. Moghadam, 175 F.3d 1269, 1281 (11th Cir. 1999).

83. *Martignon*, 346 F. Supp. 2d at 429–30.

84. *Id.* at 417–18.

85. *Id.* at 418.

86. *Id.* at 424.

87. *Id.* at 424–25.

88. *Id.* at 420 (citing Ry. Labor Executives' Ass'n v. Gibbons, 455 U.S. 457 (1982)).

89. *Gibbons*, 455 U.S. at 465.

90. *Martignon*, 346 F. Supp. 2d at 424.

91. *Id.* at 429. The district court did not consider the First Amendment issue because it had already found through its Copyright and Commerce Clause analysis that the indictment could not stand. *Id.* at 429 n.22.

On appeal, the Second Circuit considered the limited question of "the extent to which Congress can use one of its powers to enact a statute that it could not enact under another of its arguably relevant powers."[92] The court noted the lower court's four reasons for classifying § 2319A as a copyright law: (1) the TRIPS agreement was "intended to protect intellectual property;"[93] (2) § 2319A's language is "consistent with the purpose of the Copyright Clause, encouraging authors and inventors to create by granting them exclusive rights in their writings and discoveries;"[94] (3) the Committee on the Judiciary's report describes § 2319A "in terms of copyright and contains no mention of commerce;"[95] and (4) § 2319A immediately follows the criminal copyright provision and "refers to the definitions in Title 17, the copyright title of the United States Code."[96] The Second Circuit also noted the district court's conclusion that Congress did not have the power to enact § 2319A through the Copyright Clause because the provision granted "seemingly perpetual" protection to musical performances, violating the limitation requirement of the Copyright Clause.[97]

Finally, the Second Circuit noted the district court's conclusion that Congress could not enact § 2319A through the Commerce Clause; the lower court held that "Congress may not, if the Copyright Clause does not allow for such legislation, enact the law under a separate grant of power, even when that separate grant provides proper authority."[98] However, the Second Circuit remarked that such reasoning stood in direct conflict with *United States v. Moghadam*, the only other circuit decision regarding the constitutionality of § 2319A.[99]

B. The Second Circuit's Analysis of the Scope and Limits of the Copyright Clause

Because the government conceded that Congress did not have the authority to enact § 2319A under the Copyright Clause, the court focused on whether the Copyright Clause imposed limitations on Con-

92. United States v. Martignon, 492 F.3d 140, 141 (2d Cir. 2007).

93. *Id.* at 143 (citing *Martignon*, 346 F. Supp. 2d at 420).

94. *Id.*

95. *Id.* (citing *Martignon*, 346 F. Supp. 2d at 421).

96. *Id.* at 143 (citing *Martignon*, 346 F. Supp. 2d at 421–22).

97. *Id.* at 143–44 (citing *Martignon*, 346 F. Supp. 2d at 423–24).

98. *Martignon*, 492 F.3d at 144 (citing *Martignon*, 346 F. Supp. 2d at 425).

99. *Id.* at 144 n.3 (citing United States v. Moghadam, 175 F.3d 1269 (11th Cir. 1999)). While circuits may determine the same issue differently, the Second Circuit mentioned the district court's disagreement with the Eleventh Circuit's *Moghadam* decision to emphasize the paucity of litigation regarding § 2319A, as well as the district court's stark disapproval of *Moghadam*.

gress's ability to enact § 2319A through the Commerce Clause.[100] The court noted that the Copyright Clause grants power to Congress and imposes limitations upon that power, but that the text of the clause is unclear about delineating "where the grant of power ends and where the limitation(s) begin(s)."[101] First, the Second Circuit looked to Supreme Court jurisprudence regarding Congress's ability to pass legislation through the Commerce Clause.[102] Then, drawing from Supreme Court cases, the Second Circuit entertained several possible approaches to determine whether the Copyright Clause limited Congress's ability to enact § 2319A through the Commerce Clause.[103]

1. Supreme Court Jurisprudence

The Second Circuit began its analysis of the scope and limits of the Copyright Clause by examining past Supreme Court cases that dealt with Congress's power to enact legislation under the color of one constitutional provision that it could not enact through another.[104] Specifically, the court discussed the *Trade-Mark Cases*,[105] *Heart of Atlanta Motel, Inc. v. United States*,[106] and *Railway Executives' Labor Ass'n v. Gibbons*.[107]

In the *Trade-Mark Cases*, the Supreme Court determined that a criminal trademark law could not be enacted through the Copyright Clause or the Commerce Clause because the law did not require that the work be original or that the activities affect interstate commerce.[108] While the Supreme Court struck down the law in the *Trade-Mark Cases*, the Second Circuit highlighted the Court's analysis to

100. *Id.* at 144.

101. *Id.* at 145.

102. *See infra* notes 104–124 and accompanying text.

103. *See infra* notes 125–134 and accompanying text.

104. *Martignon*, 492 F.3d at 145–49.

105. The Trade-Mark Cases, 100 U.S. 82 (1879) (holding that a criminal statute pertaining to trademark infringement was unconstitutional because the Commerce Clause did not authorize Congress to pass legislation regulating the registration of trademarks that are *not* used in interstate commerce).

106. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (holding that the Commerce Clause authorized Congress to prohibit intrastate, local activities that discriminated on the basis of race, so long as the activity affected interstate commerce).

107. Ry. Labor Executives' Ass'n v. Gibbons, 455 U.S. 457 (1982) (holding that a bankruptcy law violated the Constitution's Bankruptcy Clause because the law did not uniformly apply to a defined class of debtors).

108. *Martignon*, 492 F.3d at 146 (citing *The Trade-Mark Cases*, 100 U.S. at 94, 97–98). At least one scholar points out that the Supreme Court's reasoning in the *Trade-Mark Cases* "implicitly endorsed" the idea that "legislative powers granted to Congress by the Constitution are not mutually exclusive but operate instead as alternative lawmaking authorities" when it "hinted that although federal trademark legislation could not be adopted under the Copyright Clause, it might be valid under the Commerce Clause." Graeme B. Dinwoodie, *Copyright Lawmaking*

support the idea that if Congress may not enact a law through the Copyright Clause, it still may enact the same law through the Commerce Clause, so long as the law is related to interstate commerce.[109] Additionally, the court noted that "[t]rademark legislation has long since been upheld as an exercise of Commerce Clause power even where a defendant uses its mark only in intrastate commerce."[110]

In *Heart of Atlanta*, the Supreme Court heard a constitutional challenge to the Civil Rights Act of 1964,[111] which Congress enacted under its Commerce Clause powers in an effort to eradicate racial discrimination by private parties.[112] The *Martignon* court noted that in *Heart of Atlanta*, the Supreme Court upheld Title II of the Civil Rights Act because racial discrimination has a negative effect upon interstate commerce, giving Congress the power to enact the statute under the Commerce Clause.[113] From *Heart of Atlanta*, the Second Circuit drew "the not surprising conclusion that if a statute is outside even the most generalized interpretation of the scope of the Copyright Clause, i.e., it is not a copyright law, it can be regulated under the Commerce Clause."[114]

Finally, in *Gibbons*, the Supreme Court struck down a bankruptcy law, Rock Island Railroad Transition and Employee Assistance Act (RITA),[115] which the Court determined could not have been enacted through the Bankruptcy Clause or the Commerce Clause.[116] Specifically, the *Gibbons* Court dismissed the idea that bankruptcy laws that could not comport with the Bankruptcy Clause could be enacted through the Commerce Clause.[117] While the Second Circuit acknowl-

---

Authority: An (Inter)Nationalist Perspective on the Treaty Clause, 30 COLUM. J.L. & ARTS 355, 357 (2007).

109. *Martignon*, 492 F.3d at 146 (citing *The Trade-Mark Cases*, 100 U.S. at 94, 97–98).

110. *Id.* at 146 n.4 (citing Dawn Donut Co. v. Hart's Food Stores, Inc., 267 F.2d 358, 365 (2d Cir. 1959)).

111. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241. The Supreme Court previously ruled that the Fourteenth Amendment only prohibits discrimination by state actors. The Civil Rights Cases, 109 U.S. 3, 11 (1883).

112. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 245–50 (1964).

113. *Martignon*, 492 F.3d at 147 (citing *Heart of Atlanta*, 379 U.S. at 257). The *Martignon* court placed great deference on congressional findings that an activity affects interstate commerce, especially when lawmaking determinations were as narrowly tailored as they were in *Heart of Atlanta*. *Id.*

114. *Id.*

115. Rock Island Railroad Transition and Employee Assistance Act, 45 U.S.C. § 1001 (1980). RITA provides for payments to employees in the event that railway carriers go out of business or reorganize under bankruptcy laws. *See* Ry. Labor Executives' Ass'n v. Gibbons, 455 U.S. 457, 459–63 (1982).

116. *Martignon*, 492 F.3d at 148–49 (citing *Gibbons*, 455 U.S. at 465, 468–75).

117. *Gibbons*, 455 U.S. at 468–69. Because bankruptcy laws must be uniform throughout the United States, the *Gibbons* Court reasoned that "if we were to hold that Congress had the power

edged that Martignon relied heavily on *Gibbons*,[118] it discounted the applicability of *Gibbons* to the facts at hand.[119] The court distinguished *Martignon* from *Gibbons* in one key aspect, namely, that *Gibbons* focused on categorizing the law as a bankruptcy law, which should be enacted through the Bankruptcy Clause, or commercial regulation, which should be enacted through the Commerce Clause.[120] If the law was a bankruptcy law, it should be enacted through the Bankruptcy Clause; if it was a commercial regulation, it should be enacted through the Commerce Clause.[121] The Second Circuit encouraged a narrow reading of *Gibbons*:

> The *Gibbons* Court considered primarily what RITA did, not Congress's belief as to which clause authorized its action. RITA mandated that an existing bankruptcy proceeding be handled differently from any other bankruptcy in the United States. It also altered the statutory priorities for paying debts and the administrative scheme contemplated by the Bankruptcy Code. It was a bankruptcy law.[122]

After reviewing Supreme Court jurisprudence relating to the Copyright Clause and its relation to the Commerce Clause, the Second Circuit found that "the Supreme Court's cases allow the regulation of matters that could not be regulated under the Copyright Clause in a manner arguably inconsistent with that clause unless the statute at issue is a copyright law."[123] Though the court declined to elaborate on the full scope of the Copyright Clause, the court concluded "that Congress exceeds its power under the Commerce Clause by transgressing limitations of the Copyright Clause only when (1) the law it enacts is an exercise of the power granted Congress by the Copyright Clause and (2) the resulting law violates one or more specific limits of the Copyright Clause."[124]

2. *Section 2319A as a Copyright Law*

The Second Circuit next considered whether § 2319A could accurately be characterized as a copyright law, regardless of whether Con-

---

to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws." *Id.*

118. *Martignon*, 492 F.3d at 148. Incidentally, the Second Circuit also noted that "*Gibbons* is the only case called to our attention by the parties or the amici in which the Supreme Court struck down a statute that violated the limitation of one constitutional provision despite its clear nexus to another provision." *Id.* at 149.

119. *Id.* at 149.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Martignon*, 429 F.3d at 149.

gress could enact the provision through the Commerce Clause.[125] To decide whether § 2319A is a copyright law, the Second Circuit returned to its earlier treatment of the *Gibbons* case.[126] Under the *Gibbons* standard, the court declared that "in order to demonstrate unconstitutionality, Martignon must establish that Section 2319A is a copyright law and not just that it is copyright-like."[127]

The Second Circuit defined two approaches to determine whether § 2319A could be termed copyright legislation.[128] The court first defined the "textualist" approach, under which a court must determine whether a law is a copyright law by examining whether it creates, bestows, or allocates rights to copyright holders.[129] Under the textualist approach, the court found that § 2319A is not a copyright law because it does not create, bestow, or allocate rights to copyright holders.[130] The Second Circuit then considered the history and context approach, under which a court decides whether a law is a copyright law based on the premise that copyright laws historically have allocated property rights to copyright holders.[131] Under the history and context approach, the court also determined that § 2319A does not grant property rights to copyright holders.[132] Instead, § 2319A is a criminal statute that grants only one right to copyright holders—the right of fixation—which is not a sufficient nexus to copyright law and the extensive bundle of rights granted to copyright owners.[133] Thus, the Sec-

125. *Id.* at 149–50.

126. *Id.* at 150.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Martignon*, 492 F.3d at 150.

131. *Id.*

132. *Id.*

133. *Id.* at 151. By "copyright law," the Second Circuit referred to rights granted to copyright owners:

> (1) to reproduce the copyrighted work in copies or phonorecords;
> (2) to prepare derivative works based upon the copyrighted work;
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Id. (quoting 17 U.S.C. § 106 (2000)).

ond Circuit determined that § 2319A cannot be characterized as a copyright law.[134]

C. Commerce Clause Authority

Having determined that the lower court was correct in reasoning that Congress could not enact § 2319A pursuant to the Copyright Clause, the Second Circuit addressed the issue of whether Congress had the authority to enact § 2319A pursuant to the Commerce Clause.[135] The court established the required level of scrutiny to determine whether a statute may be enacted through the Commerce Clause: a court may only strike down a law enacted through the Commerce Clause if the law has no rational basis or rational relationship to the regulated activity.[136] The court noted that § 2319A regulates fixing, selling, distributing, and copying with a commercial motive, which are "activities at the core of the Commerce Clause."[137] Further, the court noted the strong nexus between bootlegging and commerce: the thriving underground bootlegging market affects the music industry's ability to sell records and promote concerts.[138] Thus, the court reasoned that there was a rational basis for a congressional finding that bootlegging affects interstate commerce.[139]

Ultimately, the court determined that Congress had the constitutional authority to enact § 2319A pursuant to the Commerce Clause and vacated the dismissal of the indictment against Martignon.[140] Under the Second Circuit's ruling, Congress may enact copyright legislation through the Commerce Clause, so long as (1) the legislation is not in direct conflict with limitations of the Copyright Clause, and (2) the regulated activity has a minimally rational effect on interstate commerce.[141]

---

134. *Id.*

135. *Id.* at 152–53.

136. *Martignon*, 492 F.3d at 152–53 (citing Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 754 (1982)).

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* On the issue of the potential conflict of § 2319A with the First Amendment, the court remanded to the district court for determination. *Id.* Incidentally, Martignon had twenty-nine intellectual property and constitutional law professors on his side as amici curiae, indicating strong arguments on the issue for remand. *See id.*; Brief for Twenty-Nine Intellectual Property and Constitutional Law Professors as Amici Curiae Supporting Defendant-Appellee, United States v. Martignon, 492 F.3d 140 (2d Cir. 2007) (No. 04-5649-cr).

141. *Martignon*, 492 F.3d at 150–53.

IV. ANALYSIS

Martignon reflects the judicial trend of upholding Congress's power to enact anti-bootlegging legislation through the Commerce Clause.[142] This position contradicts the majority of scholarly opinions and several district court decisions.[143] This Part analyzes the Second Circuit's opinion in *Martignon* and considers the Second Circuit's description of precedent and its treatment of counterarguments.[144] This Part then examines normative considerations for *Martignon*, including those not addressed by the court.[145] Ultimately, this Part concludes that the Second Circuit's holding was correct.

A. The Second Circuit's Treatment of the District Court Opinion

In analyzing the *Martignon* facts, the Second Circuit assessed constitutional precedent, as well as the reasoning of each party.[146] This Section discusses the Second Circuit's treatment of precedent, the lower court's opinion, and counterarguments raised by amici curiae.[147]

1. Description of Precedent

Considering the scope and limits of the Copyright Clause, the Second Circuit adeptly drew on precedent and rejected Martignon's view.[148] The court's analysis primarily focused on the *Trade-Mark Cases*,[149] *Heart of Atlanta*,[150] and *Gibbons*.[151] In examining these three cases, the Second Circuit outlined its argument that "Congress can sometimes enact legislation under one constitutional provision that it could not have enacted under another."[152] In general, the Sec-

142. *See supra* notes 53–72 and accompanying text.

143. Richard B. Graves III, *Globalization, Treaty Powers, and the Limits of the Intellectual Property Clause*, 50 J. COPYRIGHT SOC'Y USA 199, 218 n.119 (2003) (listing scholarly authorities in line with the idea that Congress may not legislate around the Copyright Clause through the Commerce Clause). *But see* Patterson, *supra* note 4, at 373 (examining the history of modern bootlegging and determining that the new "tools" for artists in the Uruguay Round provisions are just, though not perfect, solutions to protecting artists' rights).

144. *See infra* notes 146–242 and accompanying text.

145. *See infra* notes 243–261 and accompanying text.

146. *See supra* notes 76–141 and accompanying text.

147. *See infra* notes 148–242 and accompanying text.

148. United States v. Martignon, 492 F.3d 140, 145–53 (2d Cir. 2007). Most of the cases discussed by the Second Circuit were also cited by other courts in cases that considered the constitutionality of anti-bootlegging statutes. *See, e.g.*, United States v. Moghadam, 175 F.3d 1269 (11th Cir. 1999).

149. The Trade-Mark Cases, 100 U.S. 82 (1879).

150. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

151. Ry. Labor Executives' Ass'n v. Gibbons, 455 U.S. 457 (1982).

152. *Martignon*, 492 F.3d at 146 (citing *Heart of Atlanta*, 379 U.S. at 260–61).

ond Circuit successfully supported its broad view of the commerce power.[153]

The Second Circuit began its analysis with the *Trade-Mark Cases*.[154] Although that case found that criminal trademark legislation was not authorized under either the Copyright Clause or the Commerce Clause, the Second Circuit extracted the underlying analytical framework to apply to *Martignon*.[155] In the *Trade-Mark Cases*, the Court first analyzed the criminal trademark statute under the Copyright Clause; after finding that the statute was invalid under that clause, the Court next considered the Commerce Clause.[156] This closely follows the Second Circuit's analysis in *Martignon*, which rejected the lower court's opinion that limitations of the Copyright Clause precluded Congress from enacting § 2319A through any other constitutional vehicle.[157] Another Supreme Court case, *United States v. Raines*,[158] indicated that courts are rarely "able confidently to discern that Congress would not have desired its legislation to stand at all unless it could validly stand in its every application."[159] Most persuasively, the Second Circuit recognized that at the time of the *Trade-Mark Cases*, the Supreme Court had a "limited view" of the Commerce Clause.[160] The court revealed that since the *Trade-Mark Cases*, the Supreme Court has taken a much broader view of the Commerce Clause, and courts have long upheld trademark legislation as a valid exercise of the Commerce Clause power.[161]

There are certainly those who argue that the Second Circuit's assessment of the *Trade-Mark Cases* was entirely wrong. From the *Trade-Mark Cases*, the Second Circuit draws the "not surprising conclusion" that Congress may enact a statute under the Commerce

153. Since 1937, the Supreme Court has embraced a broad view of the commerce power, which has been put into question since 1995. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES §§ 3.3.4, 3.3.5 (3d ed. 2006) (discussing the tug-of-war between liberal and conservative justices regarding the level of review for the regulation of interstate commercial activity); *see infra* notes 175–176 and accompanying text.

154. *Martignon*, 492 F.3d at 146.

155. *Id.* at 146.

156. *Id.* (citing The Trade-Mark Cases, 100 U.S. 82, 97–98 (1879)).

157. *Id.* at 143–44. In *Lord v. S.S. Co.*, the Supreme Court followed the *Trade-Mark Cases*, but the Court upheld an admiralty law because the law required that the regulated activity affect interstate commerce. Lord v. S.S. Co., 102 U.S. 541, 544–45 (1881).

158. United States v. Raines, 362 U.S. 17 (1960).

159. *Id.* at 23.

160. *Martignon*, 492 F.3d at 146 n.4. The period between the Civil War and 1887 saw few cases challenging Congress's Commerce Clause Power, and those that were decided were largely inconsistent. CHEMERINSKY, *supra* note 153, § 3.3.3.

161. *Martignon*, 492 F.3d at 146 n.4 (citing Dawn Donut Co. v. Hart's Food Stores, Inc., 267 F.2d 358, 365 (2d Cir. 1959)).

Clause even if it is "outside even the most generalized interpretation of the scope of the Copyright Clause, i.e., it is not a copyright law."[162] At least one federal district court opinion, *Kelley v. Great Northern Railway Co.*, interpreted the *Trade-Mark Cases* as strictly limiting Congress's power to enact any type of legislation through the Commerce Clause:

> When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, *it is reasonable to expect to find on the face of the law*, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several states . . . . *If not so limited*, it is in excess of the power of Congress.[163]

There is no mention of interstate commerce on the face of § 2319A.[164] However, the "essential nature" of § 2319A as a Commerce Clause regulation is shown by three factors. First, the drafters of § 2319A intended that Congress enact the legislation through the Commerce Clause.[165] Second, the statute itself requires that the bootlegs be made and distributed for the purposes of "commercial gain,"[166] indicating that commercial effects were on the drafters' minds. Finally, numerous recording industry entities have found that illegal bootlegging substantially affects their business—in other words, interstate commerce.[167]

The Second Circuit next analyzed *Heart of Atlanta*.[168] The Supreme Court upheld a civil rights statute as validly enacted under Congress's Commerce Clause power, even though the Court had previously declared a similar statute unconstitutional under the Thirteenth and Fourteenth Amendments.[169] The Second Circuit's assessment of *Heart of Atlanta* is consistent with numerous other constitutional challenges, including *Katzenbach v. McClung*[170] and *Wickard v. Filburn*.[171] In *McClung* and *Wickard*, the Supreme Court allowed Congress to

---

162. *Id.* at 147.

163. Kelley v. Great N. Ry., 152 F. 211, 236 (1907).

164. 18 U.S.C. § 2319A (2000).

165. *Martignon* Symposium, *supra* note 29, at 1232 (explaining that the drafters had originally slated § 2319 to go into Title 15, symbolizing its place among Commerce Clause regulations).

166. 18 U.S.C. § 2319A(a) (defining the *mens rea* for § 2319A as "knowingly and for purposes of commercial advantage or private financial gain").

167. *Martignon*, 492 F.3d at 152; *see also* IFPI REPORT, *supra* note 1, and L.A. REPORT, *supra* note 1 (finding that illegal bootlegging and piracy cost the recording industry millions of dollars every year).

168. *Martignon*, 492 F.3d at 146–47.

169. *Id.* at 146. In the *Civil Rights Cases*, the Supreme Court had previously declared civil rights legislation unconstitutional. 109 U.S. 3, 10–25 (1883).

170. Katzenbach v. McClung, 379 U.S. 294 (1964).

171. Wickard v. Filburn, 317 U.S. 111 (1942).

regulate intrastate activities that affected interstate commerce.[172] Additionally, *McClung* and other Supreme Court cases[173] support the Second Circuit's view that the rational basis standard is applicable when determining whether anti-bootlegging activities under § 2319A affect interstate commerce.[174] The Second Circuit did not discuss the recent Supreme Court debate about the level of generality required for rational basis review of Commerce Clause regulation;[175] however, most authorities agree that some incarnation of rational basis review is still the correct standard to apply to interstate commerce laws.[176]

The Second Circuit also discussed *Heart of Atlanta*'s implications for Commerce Clause regulation. From *Heart of Atlanta*, the Second Circuit concluded that "Congress can regulate under the Commerce Clause what it could not regulate under an amendment specifically aimed at the wrong at issue."[177] The Second Circuit effectively analogized the statutes in *Heart of Atlanta* and *Martignon*. In *Heart of Atlanta*, the Civil Rights Act, a commercial statute, targeted racial discrimination, which was at the heart of the Fourteenth Amendment; yet, the Act circumvented the Fourteenth Amendment's requirement that the state be a participant in discriminatory activities.[178] Similarly, in *Martignon*, § 2319A, a commercial statute, targeted the illegal fixation and distribution of performances.[179] The regulated activity goes to the core of the Copyright Clause, yet § 2319A circumvented the

172. *McClung*, 379 U.S. at 305 (holding that Congress could regulate a small business because its discriminatory activities affected interstate commerce); *Wickard*, 317 U.S. at 133 (holding that Congress could regulate one person's activity that did not affect interstate commerce by itself, so long as the aggregate effect of many similarly situated people affected interstate commerce).

173. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 22 (2005) (holding that Congress could regulate the intrastate activities of a person, so long as Congress has a rational basis to believe that the activities affect interstate commerce); United States v. Morrison, 529 U.S. 598 (2000) (holding that violence against women on a college campus was not sufficiently related to interstate commerce); United States v. Lopez, 514 U.S. 549 (1995) (holding that a gun control regulation was not sufficiently related to interstate commerce).

174. *Martignon*, 492 F.3d at 152.

175. Since *Lopez*, the Court has struggled with the level of generality at which rational basis review should be applied; something greater than rational basis—"substantial effects"—became the Supreme Court's benchmark for Commerce Clause regulation. *See* CHEMERINSKY, *supra* note 153, §3.3.5.

176. *See* Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of* Lopez, *or What If the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369 (discussing the *Lopez* decision's reception by lower courts and indicating that most lower courts still apply pre-1995 rational basis review, as the Second Circuit did in *Martignon*). In *Moghadam*, the Eleventh Circuit upheld the constitutionality of § 2319A and noted that § 2319A passes not only rational basis review, but also the "substantial effects" test of *Lopez*. United States v. Moghadam, 175 F.3d 1269, 1280 (11th Cir. 1999).

177. *Martignon*, 492 F.3d at 147.

178. *Id.* at 147–48.

179. *Id.* at 141.

Copyright Clause requirement that an author receive copyright protection for a limited time.[180]

Martignon's interpretation of *Heart of Atlanta* was inconsistent with that of the Second Circuit. Martignon argued that the Fourteenth Amendment, which was at issue in *Heart of Atlanta*, contains no specific limitations on Congress's general power to enact legislation.[181] Further, Martignon argued that the "copyright-like" nature of § 2319A makes it clear that it "falls squarely within the scope of the Copyright Clause," thus preventing Congress from enacting it through other constitutional vehicles.[182] However, the Second Circuit takes a broader, simpler view of *Heart of Atlanta*: if Congress could not enact legislation under one part of the Constitution, it could enact the statute under the Commerce Clause if the activity was sufficiently related to interstate commerce.[183]

The Second Circuit also analyzed *Gibbons*, which was an important case to distinguish from the *Martignon* facts because the lower court had heavily relied on *Gibbons*.[184] In *Gibbons*, the Supreme Court struck down RITA as "repugnant to . . . the Bankruptcy Clause"[185] and, most likely, invalid under Commerce Clause powers.[186] The Second Circuit carefully distinguished *Martignon* from *Gibbons*, which focused on whether RITA was a bankruptcy law or a commercial regulation.[187] Some scholars support this view, noting that the basis of the *Gibbons* analysis was its classification of RITA as a bankruptcy statute.[188] One commentator explains that "although [the] *Martignon* [district court] and *KISS I* followed [*Gibbons*'s] result, they did not follow its reasoning closely."[189] *Gibbons* was concerned with the integrity of the Bankruptcy Clause, but the integrity of the Copyright Clause was not likely to be affected by § 2319A.[190] In its analysis, the *Gibbons* court primarily looked to what the regulation accomplished, "not Congress's belief as to which clause authorized its action."[191] The court found that RITA was a bankruptcy law, not "bankruptcy-

180. *Id.*

181. *Id.*

182. David Patton, *The Correct-Like Decision in* United States v. Martignon, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1287, 1290 (2006).

183. *Martignon*, 492 F.3d at 148.

184. *Id.* at 148–49.

185. *Id.* at 148 (quoting Ry. Labor Executives' Ass'n v. Gibbons, 455 U.S. 457, 465 (1982)).

186. *Id.* at 149 (citing *Gibbons*, 455 U.S. at 468–69).

187. *Id.*

188. *See, e.g.*, Oliar, *supra* note 53, at 477.

189. *Id.* at 487.

190. *Id.* at 487–88.

191. *Martignon*, 492 F.3d at 149.

like," as § 2319A was "copyright-like."[192] In this light, the Second Circuit viewed § 2319A as regulating illegal bootlegging in interstate commerce.[193]

Citing *Gibbons*, some scholars, as well as the district court in *Martignon*,[194] focus on Congress's inability to enact laws through the Commerce Clause when it could not enact the laws through another constitutional vehicle.[195] In *Moghadam*, the Eleventh Circuit used the *Gibbons* rationale to support Congress's ability to enact § 2319A through the Commerce Clause[196] and recognized the tension between *Gibbons* and cases like *Heart of Atlanta* and the *Trade-Mark Cases*.[197] Acknowledging some instances in which Congress may not circumvent a clause of the Constitution by enacting legislation through the Commerce Clause, the Eleventh Circuit claimed that *Moghadam* was not such a case:

> [T]he Copyright Clause does not envision that Congress is positively forbidden from extending copyright-like protection under other constitutional clauses, such as the Commerce Clause, to works of authorship that may not meet the fixation requirement inherent in the term "Writings." . . . Extending quasi-copyright protection to unfixed live musical performances is in no way inconsistent with the Copyright Clause, even if that Clause itself does not directly authorize such protection.[198]

The Eleventh Circuit's reasoning focused on the limits of the Copyright Clause, while the Second Circuit in *Martignon* focused on *Gibbons*'s classification of RITA as a bankruptcy statute, as opposed to a commercial regulation.[199]

---

192. *Id.* The Second Circuit's position is supported by one scholar, who criticizes the district court's use of *Gibbons*:

> Basically, the *Railway Labor Executives v. Gibbons* analysis was not very persuasive . . . because the statute at issue in *Gibbons* was a bankruptcy statute. There is no question about it. The statute at issue here—certainly, at least arguably—is not a copyright statute. It is copyright-like. That is as close as the court will come to saying it is a copyright statute. It is copyright-like.

Martignon Symposium, *supra* note 29, at 1239.

193. *Martignon*, 492 F.3d at 152.

194. United States v. Martignon, 346 F. Supp. 2d 413, 420 (S.D.N.Y. 2004), *vacated*, 492 F.3d 140 (2d Cir. 2007).

195. *See, e.g.*, Michael F. Finn, *"Just the Facts, Ma'am": The Effect of the Supreme Court's Decision in* Feist Publications, Inc. v. Rural Telephone Service Co. *on the Colorization of Black and White Films*, 33 SANTA CLARA L. REV. 859, 871–72 (1993) ("It seems likely that the same rationale present in *Gibbons* would also bar any type of Commerce Clause legislation aimed at removing limitations of the Intellectual Property Clause."); Patton, *supra* note 182, at 1291–93.

196. United States v. Moghadam, 175 F.3d 1269, 1279–81 (11th Cir. 1999).

197. *Id.* at 1279.

198. *Id.* at 1280.

199. *Id.* at 1280–81.

2. Strength of the Second Circuit's Reasoning

The Second Circuit's reasoning is consistent, clear, and logical. By evaluating and dismantling the district court's reasoning,[200] as well as drawing its own conclusions, the Second Circuit crafted a convincing argument for the constitutionality of § 2319A.

The Second Circuit explored the first flaw in the district court's analysis: its assessment of the legislative history of § 2319A.[201] The district court found that Congress meant to enact § 2319A as a copyright law because the obligations of the TRIPS agreement were entirely intellectual-property-oriented, as were the definitions of terms within § 2319A.[202] While the TRIPS agreement did direct Congress to enact a legislative prohibition against commercial bootlegging, the Second Circuit pointed out that TRIPS signatories were "free to determine the appropriate method of implementing the provisions of [TRIPS] within their own legal system and practice."[203] In other words, TRIPS did not require the anti-bootlegging mechanism to be based in intellectual property law; parties were free to enact the provisions under other legal umbrellas, such as criminal systems.[204]

The district court's next explained that § 2319A is "copyright-like."[205] The Second Circuit correctly refuted this assessment and concluded that § 2319A could not be a copyright law:

> Section 2319A does not create and bestow property rights upon authors or inventors, or allocate those rights among claimants to them. It is a criminal statute, falling in its codification . . . between the law criminalizing certain copyright infringement and the law criminalizing "trafficking in counterfeit goods or services." It is, perhaps, analogous to the law of criminal trespass.[206]

The term "copyright-like," which the district court used liberally in its analysis, is also far from clear. One scholar noted that commentators and judges dubbed the term imprecise, nonsensical, "not particularly

200. *See* Nancy L. Datres, Note & Comment, United States v. Martignon: *Court Yanks the "Power" Plug on the Federal Antibootlegging Law*, 15 DEPAUL-LCA J. ART & ENT. L. & POL'Y 347, 369 (2005) (noting that "like a line of dominoes [the district court's] flawed logic topples at the slightest touch").

201. United States v. Martignon, 346 F. Supp. 2d 413, 420–22 (S.D.N.Y. 2004), *vacated*, 492 F.3d 140 (2d Cir. 2007).

202. *Id.* at 420.

203. United States v. Martignon, 492 F.3d 140, 142 (2d Cir. 2007) (citing TRIPS Agreement, *supra* note 26, art. 1(1)).

204. WILLIAM F. PATRY, COPYRIGHT AND THE GATT: AN INTERPRETATION AND LEGISLATIVE HISTORY OF URUGUAY ROUND AGREEMENTS ACT 1 (1995).

205. *Martignon*, 346 F. Supp. 2d at 419.

206. *Martignon*, 492 F.3d at 151.

helpful," or an insufficient basis to strike down the statute.[207] Additionally, the drafters of § 2319A did not believe they were drafting copyright legislation:

> If we had thought it was permissible to legislate under the Copyright Act, we would have. . . . Having decided that the Copyright Clause was limited to fixed works and that the performances in question were unfixed, we knew that we were not legislating under the Copyright Act. . . . But when the Eleventh Circuit said that Congress thought they were legislating under the Copyright Clause, I don't get that. We clearly were not. You can say we were wrong because you disagree with how we interpreted the Constitution, but to say that we thought we were legislating under the Copyright Clause is nonsensical.[208]

Instead, William Patry, congressional staffer and drafter of § 2319A, claimed that the law was originally set to be codified in Title 15 as Commerce Clause legislation.[209] Indeed, as the government noted in its appeal, "The Commerce Clause grants Congress broad authority to regulate commercial activity, and the activity in question, selling unauthorized recordings of live performances, is plainly commercial."[210]

Continuing its the deconstruction of the district court's "copyright-like" analysis, the Second Circuit noted that, under *Gibbons*, "in order to demonstrate unconstitutionality, Martignon must establish that Section 2319A is a copyright law and not just that it is copyright-like."[211] This line of thinking is supported by the *Gibbons*'s Court's broad view of the Commerce Clause, which allows Congress to legislate to protect "all the external concerns of the nation."[212] Some scholars, however, support the use of the term "copyright-like" as an expression related to § 2319A and other "quasi-copyright" protections of authors' works.[213] One scholar, David Patton, noted that there will be an increasing amount of copyright-like or quasi-copyright laws as the United States continues to pass more novel intellectual property

---

207. Patton, *supra* note 182, at 1287 (internal quotation marks omitted). William Patry, who drafted § 2319A, agreed: "The idea that it could be 'copyright-like' I don't quite get either. You are pregnant or you are not pregnant. Either it is a Copyright Clause or it is not a Copyright Clause. It can't be 'copyright-like.'" *Martignon* Symposium, *supra* note 29, at 1234.

208. *Martignon* Symposium, *supra* note 29, at 1233 (internal citations omitted) (William Patry speaking). Patry also said that, as a copyright lawyer, his first instinct was to draft § 2319A as copyright legislation, but the limitations imposed on copyright law by the Copyright Clause made it clear that such a designation would not be possible. *Id.*

209. *Id.* at 1232.

210. Brief for the United States, *supra* note 6, at 6.

211. *Martignon*, 492 F.3d at 150.

212. Brief for the United States, *supra* note 6, at 8 (quoting Gibbons v. Ogden, 22 U.S. 1, 196 (1824)).

213. *See, e.g.*, Patton, *supra* note 182. Patton noted that the district court in *Martignon* "was not the first to use the term 'copyright-like,' and [it] will likely not be the last." *Id.* at 1287.

statutes.[214] Such nontraditional intellectual property laws may rightly be considered "copyright-like" because "they both regulate in the field of intellectual property, but do so in ways novel to traditional American intellectual property legislation."[215] Additionally, Patton noted that new intellectual property laws are more frequently being passed in response to international treaties, moving the United States closer to Europe's "neighboring rights" view of intellectual property and away from the more traditional constitutionally based view.[216]

To determine whether § 2319A is a copyright law, the Second Circuit set out two approaches for examining the Copyright Clause: the text of the clause and the history and context of the clause.[217] While the court did not choose which is the better method to use to assess § 2319A's status, the court correctly judged that the statute may not be classified as a copyright law under either method. Though the reasoning might be strengthened by dictating that a court must use *both* methods to classify § 2319A, the reasoning is nonetheless sound. Looking to a statute's text, as well as the statute's history and context, are typical methods of analysis to determine legislative intent for statutes.[218]

Under the Second Circuit's reasoning, § 2319A may fall under the Commerce Clause so long as it is not a copyright law.[219] After determining that that § 2319A was not a copyright law, the Second Circuit swiftly ruled that § 2319A was "well within the scope of Congress's Commerce Clause authority."[220] The court's brief Commerce Clause analysis is not surprising because the constitutional level of analysis for commercial regulations is only rational basis.[221] Under this minimal level of scrutiny, two facts are sufficient for the court to conclude that § 2319A falls under the Commerce Clause: (1) the mention of "commercial advantage" in § 2319A;[222] and (2) the "eminently reasonable" congressional conclusion that the market for bootlegged records "will have a substantial interstate effect on the sale and distribution of legitimate phonorecords."[223] Opponents may criticize the

214. *Id.* at 1287–88.

215. *Id.* at 1288.

216. *Id.*

217. United States v. Martignon, 492 F.3d 140, 150–51 (2d Cir. 2007).

218. *See* CHEMERINSKY, *supra* note 153, § 1.4 (discussing textualist and contextualist interpretations for the Constitution, statutes, and regulations).

219. *Martignon*, 492 F.3d at 152.

220. *Id.* at 152–53.

221. *Id.* at 152 (quoting Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 754 (1982)).

222. 18 U.S.C. § 2319A(a) (2000).

223. *Martignon*, 492 F.3d at 152–53.

Second Circuit's apparently dismissive attitude, especially the lack of statistics or evidence cited by the court regarding the effect of unauthorized bootlegging on the legal market. However, under rational basis analysis, it is not necessary to prove that the behavior actually affects interstate commerce; the court need only find that Congress reasonably believed the behavior would affect interstate commerce.[224] Few commercial regulations will overcome this presumption of constitutionality.[225] Further, as the Government noted in its brief, the Supreme Court does not require "that Congress have actually considered whether the activity in question impacts . . . interstate commerce."[226]

3. *Treatment of Counterarguments*

The Second Circuit's treatment of Martignon's claims and other counterarguments was thorough, though cursory at times. Martignon's stance is supported by scholarly research and is not unreasonable.[227] The Second Circuit allowed for this in some cases, admitting that some clauses of the Constitution did apply to other clauses.[228] Further, the Second Circuit conceded that the Copyright Clause itself is unclear about the scope of power it grants to Congress.[229] Thus, while the Second Circuit's reasoning might have benefited by more thoroughly addressing the opponents' arguments, the court ultimately comes to the correct conclusion.

Aside from the Second Circuit's constitutional precedent, discussed above,[230] the court also addressed Martignon's argument that the limits of the Copyright Clause extend to the regulation of creative works

224. *See* Gonzalez v. Raich, 545 U.S. 1, 19 (2005) (holding that Congress had a rational basis to enact a law to regulate home-grown marijuana because such activity would affect interstate commerce).

225. *Martignon*, 492 F.3d at 152 (citing Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976)). Even under the new rational basis standard defined under *United States v. Lopez*, the Supreme Court has upheld federal statutes in its two most recent Commerce Clause challenges: *Gonzales v. Raich*, 545 U.S. 1 (2005) and *Pierce County v. Guillen*, 537 U.S. 129 (2003). *See* CHEMERINSKY, *supra* note 153, § 3.3.5.

226. Brief for the United States, *supra* note 6, at 10 (citing Fullilove v. Klutznick, 448 U.S. 448, 473–75 (1980); Mills v. Maine, 118 F.3d 37, 43 (1st Cir. 1997); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 131 F.3d 353, 358 (3d Cir. 1997)).

227. Brief of Defendant-Appellee, United States v. Martignon, 492 F.3d 140 (2d Cir. 2007) (No. 04-5649-cr); Brief for Internet Archive et al. as Amici Curiae Supporting Defendant-Appellee, United States v. Martignon, 492 F.3d 140 (2d Cir. 2007) (No. 04-5649-cr); Brief for Twenty-Nine Intellectual Property and Constitutional Law Professors, *supra* note 140; *see* Graves, *supra* note 143.

228. *Martignon*, 492 F.3d at 144.

229. *Id.* at 145.

230. *See supra* notes 148–199 and accompanying text.

under other Congressional powers.[231] The skeptical Second Circuit pointed out that Martignon's authority, *Graham v. John Deere Co.*,[232] does not contain such a holding.[233] Ultimately, the Second Circuit is correct: *Graham* contains little consideration of the Copyright Clause's limitations on other Constitutional clauses. Further, the Second Circuit noted that the Copyright Clause itself is far from clear about the limitations placed on "copyright-like" legislation under other Article 1, Section 8 powers.[234] Under the Second Circuit's interpretation, the *Graham* decision suggests that "the power granted and the limitations are virtually coterminous."[235] The Copyright Clause may be another area of constitutional law that must be molded by modern-day lawmakers; the founding fathers could not have envisioned methods of copying that would be as simple as DVD burners, digital recorders, and other tools. Therefore, Congress should have the power to protect authors' rights through other constitutional avenues when the Copyright Clause is unavailable.

Further, the Second Circuit noted that Martignon's contentions were not outrageous—the court simply did not agree.[236] For instance, the Second Circuit acknowledges that Martignon's position on *Heart of Atlanta* "may have some logic to support it."[237] This treatment is far from the flat rejection of other claims by Martignon. In fact, the applicability of *Heart of Atlanta* is questioned by the amicus curiae brief brought on Martignon's behalf by twenty-nine law professors, who noted that the *Heart of Atlanta* Supreme Court held that "the Civil Rights Act of 1964 could not be justified under the Fourteenth Amendment, but unlike the Copyright Clause, the Fourteenth Amendment contains no limitations precluding such legislation under another independent authority."[238] The Second Circuit, however, tackled and dismissed the argument that the Copyright Clause contains express limitations and determined that the limitations of the

231. *Martignon*, 492 F.3d at 145–46. The limitations on the Copyright Clause are that the work in question must be fixed in a tangible medium of expression, and that the copyright vest in the author for a limited time. 17 U.S.C. § 102 (2000). *See also* U.S. CONST. art. I, § 8, cl. 8; *Martignon*, 492 F.3d at 145–46.

232. Graham v. John Deere Co., 383 U.S. 1 (1966) (holding that the Patent Act of 1952 did not change the general requirements for patentable inventions and that inventions at issue in the case were not patentable because they were obvious to a person of ordinary skill in the pertinent art).

233. *Martignon*, 492 F.3d at 145.

234. *Id.* at 145–46.

235. *Id.* at 146 (quoting *Graham*, 383 U.S. at 5).

236. *Id.* at 148.

237. *Id.*

238. Brief for Twenty-Nine Intellectual Property and Constitutional Law Professors, *supra* note 140, at 14.

Copyright Clause end with copyright laws and do not apply to commercial legislation.[239]

Additionally, the amicus curiae brief focused on § 2319A's lack of fixation requirement as evidence of its unconstitutionality.[240] While *Martignon* used the lack of fixation requirement to show that § 2319A did not fall under the scope of the Copyright Clause as copyright legislation, amici curiae argued that the rights of fixation conferred upon authors by § 2319A—that only the author of a work may fix the work in a tangible medium of expression—are "indistinguishable from those provided by copyright law."[241] However, the Second Circuit's view of the limitations of the Copyright Clause differs from the view of amici curiae. The Second Circuit supported the constitutionality of "copyright-like" legislation as operating outside the limits of the Copyright Clause, while amici curiae believed that the Copyright Clause limits the Commerce Clause—and presumably all other clauses of the Constitution, as well.[242]

B. *Normative Consideration of* Martignon

The intellectual property community responded forcefully to *Martignon*.[243] While some scholars were shocked at the lower court's decision, many, possibly a majority, opposed the reasoning in the Second Circuit's assessment.[244]

Congress enacted § 2319A and other anti-bootlegging statutes pursuant to international obligations, and, as such, the United States is bound by the law of treaties to implement the legislation.[245] International pressures should encourage the United States to make treaty compliance a priority.[246] However, some scholars expressed frustra-

239. *See supra* notes 100–134 and accompanying text.

240. Brief for Twenty-Nine Intellectual Property and Constitutional Law Professors, *supra* note 140, at 15–20.

241. *Id.* at 21.

242. *See supra* notes 100–134 & 238 and accompanying text.

243. Patry, who drafted § 2319A, said, "I never expected any statute I wrote to be held unconstitutional and certainly not by second-year law students." *Martignon* Symposium, *supra* note 29, at 1225.

244. *See* Graves, *supra* note 143, at 218 ("Despite the careful wording of the *Moghadam* opinion, the majority of scholars who have considered the issue have come to the conclusion that its central holding—that Congress can do under the Commerce Clause what it cannot do under the Copyright Clause—is incorrect."). *See, e.g.*, *id.* at 218 n.119 (noting a long list of authorities opposed to the idea that Congress could legislate around the Copyright Clause by using the broader authority granted in the Commerce Clause). *See generally* Patton, *supra* note 182.

245. *See supra* notes 28–29 and accompanying text.

246. As Justice Oliver Wendell Holmes wrote in *Missouri v. Holland*: "It is obvious that there may be matters of the sharpest exigency for the national well-being that an act of Congress could not deal with but that a treaty followed by such an act could . . . ." 252 U.S. 416, 433 (1920).

tion at the district court's *Martignon* decision, pointing out that the district court's assessment made it impossible for the United States to uphold its treaty obligations under the URAA.[247] Commentators have indicated that there may have been other ways to validate § 2319A other than through the Commerce Clause. For example, one commentator suggested that Congress could have enacted § 2319A through the Treaty Power.[248] Criticizing the district court's holding, this view posits that "the treaty power of the Necessary and Proper Clause provides Congress with the power to do things pursuant to ratification of an international agreement that it has no Article I power whatsoever to do."[249] If the enforcement of a treaty conflicts with defined constitutional rights, the treaty would be unenforceable.[250] However, in the case of *Martignon*, there is no constitutional right to create and sell unauthorized bootlegs of musical performances, so the flexible Treaty Power would likely support Congress's ability to enact § 2319A.[251]

On the other hand, other commentators express skepticism that § 2319A and other such "copyright-like" legislation might be enacted through the Treaty Power.[252] These scholars view the Treaty Power as more limited under *Reid v. Covert*.[253] In *Reid*, the Supreme Court invalidated a statute on the basis of a conflict with the Bill of Rights.[254] One author noted that "we can now say with confidence that the Treaty Power, at least in the domain of individual rights—the setting of *Reid v. Covert*—is subject to the Constitution's other limitations."[255] These scholars interpret *Reid* as a more serious limitation of Congress's power to enact legislation pursuant to its Treaty Power.

Enacting criminal sanctions to protect intangible property rights, such as copyright, makes sense in many ways. Copyright, like other

247. *Martignon* Symposium, *supra* note 29, at 1245–46.

248. *Id.* at 1244. This commentator, Bob Clarida, drafted a brief to this effect on behalf of the RIAA during litigation of *Martignon* in the lower court. Brief for UMG Recordings et al. as Amici Curiae Supporting Defendant-Appellee, United States v. Martignon, 492 F.3d 140 (2d Cir. 2007) (No. 04-5649-cr).

249. *Martignon* Symposium, *supra* note 29, at 1244.

250. *Id.* at 1245 (citing Reid v. Covert, 354 U.S. 1 (1957) as an example of a treaty that was held to be unenforceable on the basis of a conflict with constitutional rights).

251. *Id.*

252. *See, e.g.*, Graves, *supra* note 143, at 224–25 (citing Robert Anderson IV, *"Ascertained in a Different Way": The Treaty Power at the Crossroads of Contract, Compact, and Constitution*, 69 GEO. WASH. L. REV. 189 (2001)).

253. Reid v. Covert, 354 U.S. 1 (1957).

254. *Id.* at 21 ("Having run up against the steadfast bulwark of the Bill of Rights, the Necessary and Proper Clause cannot extend the scope of Clause 14.").

255. Graves, *supra* note 143, at 224–25 (quoting Anderson, *supra* note 252, at 192).

intellectual property rights, is a valuable commodity.[256] As shown by industry reports, the U.S. entertainment industry generates billions of dollars per year in revenue, concert ticket sales, and licensing rights, and conversely loses billions per year to piracy and bootlegging.[257] Naturally, the criminal law has emerged as one of the strongest candidates to protect the owners of such valuable rights.[258] While civil remedies exist for plaintiffs who seek to recover lost profits and rights from bootleggers,[259] the criminal law offers other advantages, such as deterrence of future bootleggers. Further, in criminal cases, the government foots the bill for litigation, which many artists may not be able to do in civil court; in this way, criminal prosecution offers protection for an artist's work free of charge to the artist.[260] Thus, the Second Circuit's reasoning in *Martignon* serves artists' interests, as well as the United States' interest in complying with its treaties abroad. *Martignon*'s normative implications are therefore positive for the entertainment industry, which generates billions of dollars in the U.S. economy every year.[261]

V. IMPACT

In *Martignon*, the Second Circuit supported the existing body of law in several important ways. In the realm of copyright law, *Martignon* upheld "copyright-like" protection for authors through criminal sanctions.[262] With regard to the Commerce Clause, *Martignon* continued down the path set by previous cases: Congress may do indirectly what it could not do directly through another constitutional avenue.[263]

A. *Copyright Clause Ramifications of* Martignon

Many scholars are averse to enacting protection for copyright owners through constitutional vehicles other than the Copyright Clause.[264] While this school of thought seeks to prevent Congress from enacting laws that fail the requirements of copyright law, the effect of such a hard-and-fast rule would leave copyright owners without protection

256. *See generally* Moohr, *supra* note 32.

257. *See* IFPI REPORT, *supra* note 1, at 4 (estimating that losses to the music industry from digital theft, including piracy and bootlegging, run in billions of dollars per year).

258. *See generally* Moohr, *supra* note 32.

259. The civil remedy against bootleggers is codified at 17 U.S.C. § 1101 (2000).

260. *See* Brief for UMG Recordings, *supra* note 248, at 6–9.

261. *See* IFPI REPORT, *supra* note 1, at 4.

262. United States v. Martignon, 492 F.3d 140, 152 (2d Cir. 2007).

263. *Id.* at 152.

264. See *supra* note 143 for some examples of scholars who disagree with *Martignon*'s Commerce Clause holding.

for their work when civil remedies fail. *Martignon* and similar cases have correctly allowed Congress to open the door for copyright protection through other constitutional avenues, recognizing that U.S. treaty obligations and the importance of authors' rights mandate protection beyond what has been offered in the past.[265]

Martignon supports the idea that Congress can create copyright-like laws that do not comply with the requirements of the Copyright Clause, namely fixation and copyright expiration.[266] This significantly impacts copyright law, because it signifies that even works that are unfixed (i.e. concert performances) will receive some copyright protection.[267] The unfixed works will benefit from the deterrent effect that the criminal statute will have on bootleggers.[268]

Specifically, some scholars have noted that criminal protection against unauthorized fixation of an author's expression has a stifling effect on the public domain.[269] For example, the American Association of Law Libraries wrote an amicus curiae brief in support of affirming the lower court's opinion, because allowing unauthorized fixation "leads to the preservation and dissemination of our cultural heritage," which "ensures that this cultural heritage is available to future generations."[270] Others agree, noting examples of early unauthorized music recordings that provided insight into music of the past.[271] One author even calls bootleggers "the custodians of vocal history."[272] However, by finding § 2319A constitutional, the *Martignon* court recognizes an author's right to decide whether his work should be made available to the public in fixed recordings. As such, the case is strong support for the proprietary rights of authors in their works.

B. Commerce Clause Ramifications of Martignon

Recent constitutional disputes regarding Congress's Commerce Clause power support the idea that Congress may legislate through the Commerce Clause in spite of the limitations of other provisions of

265. *See* Dinwoodie, *supra* note 108, at 357–58.

266. *Martignon*, 492 F.3d at 152.

267. See Patterson, *supra* note 4, at 402 ("After decades of piracy and the relatively recent proliferation of bootlegging, the general consensus in the international community is that a more effective remedy under individual nations' intellectual property law should be sought through a new mechanism." (citing CRAIG JOYCE ET AL., COPYRIGHT LAW 1004 (3d ed. 1994))).

268. *Id.*

269. Brief of Internet Archive, *supra* note 227, at 12–23.

270. *Id.* at 13.

271. *See* HEYLIN, *supra* note 1, at 1–21 (noting examples of recordings that preserved vital music history, including Bob Dylan's "Great White Wonder" album and early recordings of jazz musicians).

272. *Id.* at 22.

the Constitution.[273] Thus, *Martignon* adds to the line of precedent that has determined that Congress may legislate through the Commerce Clause, even when Congress could not legislate through other constitutional mechanisms.

The intersection of copyright law and Commerce Clause litigation is likely to increase as digital bootlegging and piracy become easier and more widespread. *Martignon* adds another point of law to that increasingly widening constellation: Congress may enact "copyright-like" legislation through the Commerce Clause, if it is sufficiently distinct from copyright law such that the law is not connected to a copyright holder's property rights.[274]

Finally, because the constitutional challenges to civil and criminal anti-bootlegging statutes have unanimously determined that Congress had the ability to enact "copyright-like" statutes through the Commerce Clause,[275] it is unlikely that the Supreme Court will hear the case. With *Martignon* as another brick in the wall, this area of law now appears more solid than before, encouraging more circuits to follow the reasoning in *KISS*, *Moghadam*, and *Martignon*.

VI. CONCLUSION

While the *Martignon* decision conflicts with some scholarly opinion about the limitations of the Commerce Clause, it is supported by other federal courts that have upheld the constitutionality of the anti-bootlegging statutes, including the *KISS* cases and *Moghadam*.[276] Also, the *Martignon* decision has helped the U.S. adhere to its treaty obligations and keep pace with international copyright law.[277]

The digitalization of the entertainment industry has meant that it is easier than ever for bootleggers to record, copy, and distribute artists' music.[278] Copyright protection should not diminish merely because it cannot keep up with technology. Instead, copyright protection in the United States must keep pace with protection abroad, even if Congress must legislate through nontraditional means.[279] If Congress finds that criminal sanctions will deter bootleggers from recording,

273. *See supra* notes 73–141 and accompanying text.

274. United States v. Martignon, 492 F.3d 140, 149, 152 (2d Cir. 2007).

275. *See supra* notes 53–141 and accompanying text.

276. *See supra* notes 53–72 and accompanying text.

277. *See Martignon* Symposium, *supra* note 29, at 1226.

278. *See generally* IFPI REPORT, *supra* note 1.

279. 4 NIMMER & NIMMER, *supra* note 8, § 17.01[A] ("We have now reached the stage where 'internationalization is an integral component of U.S. copyright lawmaking.'" (citing Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469, 483 (2000))).

distributing, and selling unauthorized recordings of performances, then that finding is entitled to the same deference as other criminal provisions. Criminal sanctions' effect on bootleggers will be known in time; until then, bootleggers are on notice as to the gravity of their crimes.

*Valerie R. Sherman**

* J.D. Candidate 2009, DePaul University College of Law; B.A. 2004, Illinois State University. Deep thanks to Professor Roberta Kwall for her valuable guidance and expertise, and to my husband, family, and friends, who helped me get through every day of law school with their humor, patience, and love. This paper was submitted to the Nathan Burkan Memorial Competition in the summer of 2008.